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Corporations--1975 Amendments to the West Virginia Corporations Act

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STUDENT NOTES

CORPORATIONS—1975 AMENDMENTS TO THE WEST VIRGINIA CORPORATIONS ACT

The West Virginia Corporation Act, passed by the West Virginia Legislature in March 1974, became the first comprehensive corporation act adopted in West Virginia since 1931.¹ The Act was drafted by the Corporation Law Study Committee, created by the Legislature, and subsequently forwarded to the Special Committee to Study the Recodification of the Corporate Laws of West Virginia, established by the West Virginia State Bar to study the new Act and suggest amendments to it. Because of the Special Committee's work, the effective date of the Act was delayed until July 1, 1975. Many of the proposed amendments were adopted by the 1975 Legislature.² It is the purpose of this article to condense the exhaustive treatment of the original Act, found in a previous article appearing in the West Virginia Law Review,³ and identify each amendment of consequence. Treated in depth are those amendments deemed to be both meaningful and of general interest to lawyers dealing with the new Corporation Act. The new Act will be referred to as the Act, the unamended version, as the Original Act, and any prior statute will be specifically dated.

I. THE PROCESS OF INCORPORATION

The first step after reaching a decision to incorporate is to choose a name. The Original Act provided that the corporation name must contain one of the following words: corporation, company, incorporated, limited, or any abbreviation of these words.⁴ Under the Original Act, a corporation, either domestic or foreign, could reserve a name for a period of time prior to incorporation, as could a natural person.⁵ Incorporation of a business or

¹ This act is found in W. VA. CODE ANN. § 31.1-1 *et seq.* (Cum. Supp. 1974); as amended W. VA. CODE ANN. § 31.1-1 *et seq.* (1975 Replacement Volume) [hereinafter cited as Original Act].

² W. VA. CODE ANN. § 31.1-1 *et seq.* (1975 Replacement Volume) *amending* W. VA. CODE ANN. § 31.1-1 *et seq.* (Cum. Supp. 1974) [hereinafter cited as Act].

³ Note, *Corporations — A Survey of the Pending West Virginia Corporation Act*, 77 W. VA. L. REV. 50 (1975) [hereinafter cited as *Corporations*].

⁴ Original Act § 31.1-11(a)(1).

⁵ Original Act § 31.1-12. *See also Corporations* at 57.

nonprofit corporation could be done by either one or more persons, or by an existing domestic or foreign corporation.⁶ These provisions were not amended.

As to matters of substance to be included in the articles of incorporation, for business and nonprofit corporations, the Original Act has been amended to include not only previously required factors such as the name of the corporation and the purposes of the corporation, but also, by amendment, the addresses of the principal office and of the person to whom the Secretary of State sends notice or process, if such a person has been appointed by the corporation.⁷ A second addition, by amendment, is a provision peculiar only to business corporations, stating that if shareholders were to be denied the pre-emptive right to acquire additional unissued or treasury shares of the corporation's stock, this denial be a proviso listed among the articles of incorporation.⁸ The Act, prior to amendment, did not require information as to the identity of the drafters of the articles of incorporation, although before the passage of the Act this information was requisite to the articles.⁹ By amendment, the Act now requires the inclusion of the name and address of the person who, or the firm which, prepared the articles of incorporation.¹⁰ Perhaps this provision not only will assist in the control of the unauthorized practice of law, but also should allow for a greater degree of accountability and professional draftsman-ship in the roots of the corporation's birth, and the basis of the corporation's powers, purposes and policies.

Upon completion of the articles of incorporation, the Original Act required the incorporators to sign and deliver copies of the articles in duplicate to the Secretary of State.¹¹ An amendment to this section requires the duplicate originals, "howsoever reprod-

⁶ Original Act § 31-1-26. See also *Corporations* at 58.

⁷ Act § 31-1-27. This amendment will be consistent with the amendment to Act § 31-1-56. See also *Corporations* at 59.

⁸ Act § 31-1-27(b)(4). Early charters were entirely silent on the pre-emptive right of stockholders to subscribe to new issues, but the right has been applied as long ago as 1807 in *Gray v. Portland Bank*, 3 Mass. 364 (1807). It may still be implied unless the right to new issues is denied by express provisions in the articles of incorporation.

⁹ Law of March 10, 1967, ch. 29, § 31-1-6(k) [1967] Acts of the Legislature of West Virginia (repealed 1974).

¹⁰ Act § 31-1-27(f).

¹¹ Original Act § 31-1-28(a).

uced," to be executed in the original.¹² This change was not submitted by the Special Committee, yet the Legislature found the need for clarity. The phrase may be interpreted to include an extension of the requirement of duplicate originals, allowing submission of the articles of incorporation, the original copy and a reproduction, or two reproductions. Regardless of the form submitted, the incorporators should anticipate no problem of whether the original copy must be submitted first, or even that there be an original copy of the articles of incorporation of record.

Finally, the Act prior to amendment required the corporation to file the articles of incorporation and certificate of incorporation with the clerk of the county court where its principal office was located.¹³ This was a restrictive view and caused problems for corporations which had multi-state or multi-county operations. Thus, an amendment was suggested and adopted that provided relief for the corporation with several places of business. The new provision allows an out-of-state corporation, with no West Virginia principal office, to record the articles and certificate of incorporation in the county, or one of the counties, in which it conducts its affairs, or does or transacts its principal business.¹⁴

II. THE CORPORATE OPERATION

A. BYLAWS

The Original Act provided that after the Secretary of State issued the certificate of incorporation, the corporation was required to hold an organizational meeting.¹⁵ The original provision was confusing, however, as to who was required to attend and vote at such meetings. There exists an apparent conflict between one provision of the Original Act, which stated that the purpose of the organizational meeting of the shareholders was to adopt bylaws, and another section of the Original Act which granted the directors exclusive power to adopt the initial bylaws.¹⁶ The conflict that has

¹² Act § 31-1-28(a). The exact wording of the amendment reads: "[w]hich is used in this article shall mean two copies, howsoever reproduced, both of which are executed in the original"

¹³ Original Act § 31-1-28(b).

¹⁴ Act § 31-1-28(b).

¹⁵ Original Act § 31-1-30. *See also* 2 MODEL BUS. CORP. ACT ANN. §§ 54, 57 (2d ed. 1971); *Corporations* at 61.

¹⁶ *Corporations* at 61. The part of the argument centers on the conflict between §§ 31-1-30 and 31-1-17 of the Act.

occurred arises from an overlapping of the Model Act with West Virginia corporation law prior to 1974. The Model Act provides that after the certificate of incorporation has been issued, an organizational meeting of the board of directors named in the articles of incorporation shall be held for the purpose of adopting bylaws.¹⁷ The Code, prior to 1974, required the *incorporators* to call a general meeting to elect directors and also to adopt bylaws.¹⁸ The product was a combination of the two into the Act's provision stating that after the issuance of the certificate of incorporation the shareholders, members or incorporators may adopt by-laws.¹⁹ Thus, a built-in inconsistency in the law exists because the new Act,²⁰ taken verbatim from the Model Act,²¹ states that the initial bylaws of a corporation shall be adopted by its board of directors, and that includes the power to alter, amend or repeal the bylaws. This is a reversal from the provision prior to 1967, which required adoption and amendment of the bylaws by the stockholders.²² The remedy would have been the adoption of a provision of the Model Act which provided that directors be named in the articles of incorporation and, for that reason, attendance and notification would apply only to the directors for the purpose of calling an organizational meeting and at that time adopt bylaws. However, the section was not adopted, and the present inconsistency remains.

Under the Original Act the bylaws must specify the time and place of shareholder meetings, with the important addition to existing West Virginia corporation law of a right in any shareholder to apply to the circuit court of the county of the corporation's principal office for an order directing a meeting of the shareholders to be held if one has not been called within any thirteen-month period, or the time fixed in the bylaws.²³ The Original Act further provided that notice of the shareholders' meetings be in writing, stating the place, day and hour of the meeting, and in the case of a special meeting, the purpose for which the meeting is called. This

¹⁷ 2 MODEL BUS. CORP. ACT ANN. §§ 54, 57 (2d ed. 1971).

¹⁸ Law of March 11, 1967, ch. 105, § 31-1-9 [1967] Acts of the Legislature of West Virginia (repealed 1974).

¹⁹ Act § 31-1-30.

²⁰ Act § 31-1-17.

²¹ 2 MODEL BUS. CORP. ACT. ANN. § 27 (2d ed. 1971).

²² W. VA. CODE ANN. § 31-1-19 (1972 Replacement Volume).

²³ Original Act § 31-1-18.

provision also required notice to be delivered either personally or by mail.²⁴

By amendment, the foregoing conditions must be met unless the bylaws provide otherwise.²⁵ This amendment allows business and nonprofit corporations, with large memberships, the opportunity to provide their own procedures of notification of shareholder meetings. More specifically, notification by publication in mass newsprint forms was not permitted by the Original Act;²⁶ but by amendment, publication is allowed and may be the most useful method to reach a large shareholder membership. This will be of particular importance and less expense to nonprofit corporations.

B. SHAREHOLDERS

The Original Act introduced change to the corporation laws of West Virginia concerning the rights of the shareholders. Important provisions left unchanged were: (a) the lowering of the quorum requirement allowing shareholder approval by less than a majority of those entitled to vote,²⁷ and in the case of a nonprofit corporation, the percentage of members which constitute a quorum specified in the bylaws;²⁸ (b) the law of voting of shares, where each outstanding share of stock is entitled to one vote on each matter submitted for consideration at a meeting of the shareholders, unless otherwise provided in the articles of incorporation;²⁹ (c) the voting of one's shares by person or proxy, executed in writing by the shareholder, or by the attorney in fact of the shareholder, who

²⁴ Original Act § 31-1-19.

²⁵ Act § 31-1-19.

²⁶ Original Act § 31-1-19. Before the Act, notice of shareholders' meetings could be given either by delivery or by publication of the notice as a Class II legal advertisement in the county of the principal office or place of business of the corporation. W. VA. CODE ANN. § 31-1-21 (1972 Replacement Volume). The present amended section specifies only that section nineteen will be the procedure unless otherwise provided in the bylaws. This means the corporate officers may initiate any procedure of notification they wish.

²⁷ Original Act § 31-1-20. The pre-Act law required a majority of those entitled to vote to constitute a quorum. Law of March 11, 1967, ch. 105, § 31-1-21 [1967] Acts of the Legislature of West Virginia (Repealed 1974). In finding a quorum, the present Act looks to those shareholders who, in person or represented by proxy, will constitute a quorum, unless the number falls below one-third of the shares entitled to vote at the meeting. Act § 31-1-20.

²⁸ Original Act § 31-1-20.

²⁹ Original Act § 31-1-93.

may be either a person or corporation;³⁰ (d) the limitation of liability of a shareholder to the corporation or its creditors to the extent of the individual's stock subscription,³¹ with an assignee or transferee of shares exempt from liability for the value of the unpaid consideration if the transfer was in good faith and taken without notice or knowledge that full consideration for the shares had not been paid;³² and, (e) the maintenance of a derivative action by a shareholder, provided the purchase of shares was not in bad faith or for the sole purpose of engaging in litigation.³³

A shareholder has the pre-emptive right to purchase additional issuances of shares of stock in order to maintain his apportionment of the total share of stock in the corporation.³⁴ The Original Act provides for a provision in the articles of incorporation that would limit or deny the pre-emptive right to acquire unissued or treasury shares.³⁵

An amendment might have been in order to allow the corporation, by charter provision, the power to deny or limit the pre-emptive right to purchase *additional* issues of stock,³⁶ in addition to the section allowing the corporation, by stipulation in the arti-

³⁰ *Id.* "The addition of this provision enhances the ability of management to successfully solicit proxies from shareholders otherwise unable to execute their proxy due to incompetency or absence from the country and facilitates the transaction of corporate business requiring shareholder approval." *Corporations* at 70.

³¹ Original Act § 31-1-89. The stockholders, directors, and officers are not liable for the debts of the corporation in the absence of wrongdoing. *Wheeling Kitchen Equip. Co. v. R & R Sewing Center, Inc.*, 154 W. Va. 715, 179 S.E. 2d 587 (1971).

³² *Id.* "Like the bona fide purchaser defense, this provision will provide a measure of security to purchasers of stock against incurring unexpected liability." *Corporations* at 73.

³³ Original Act § 31-1-103. The Act requires share ownership by the complainant himself or by one through whom the complainant's ownership devolved by law. The case law interpretation has been that this will unnecessarily deprive shareholders, purchasing without knowledge of the wrongful transactions, of the opportunity to protect their investment through the maintenance of a derivative suit. It was asked to include this section, in *Corporations* at 75, but an amendment has not been forthcoming. Therefore, West Virginia statutory law and case law are not in agreement.

³⁴ *Corporations* at 72.

³⁵ Original Act § 31-1-90. *See also Corporations* at 72, 73.

³⁶ Law of March 10, 1967, ch. 28, § 31-1-6(i) [1967] Acts of the Legislature of West Virginia (repealed 1974). This pre-Act provision authorized denial of the pre-emptive right by charter provisions as to additional issuances, but not as to unissued shares of the original authorization.

cles of incorporation, to deny the shareholder a pre-emptive right to acquire *unissued* or *treasury* shares.³⁷

The framers of this amendment intended to allow denial of the pre-emptive right of unissued shares, treasury shares and additional issues of stock. Originally, only the pre-emptive right to additional issues of stock of the corporation could be denied.³⁸ After the passage of the corporation act, the only denial of pre-emptive rights pertained to unissued and treasury shares of the corporation.³⁹ An amendment was then adopted to deny the pre-emptive right to purchase unissued or treasury shares, "theretofore and thereafter" authorized.⁴⁰ What the framers intended was to allow denial of pre-emptive rights to all shares of stock the corporation would authorize. This would include the stock originally issued and then repurchased, the stock authorized but not issued, and any stock thereafter authorized by amendment to the articles of incorporation. What is required, in order to make the provision on pre-emptive rights and its amendment work, is a broad interpretation of the word "unissued" in the phrase "unissued or treasury shares theretofore and thereafter" authorized, such that "unissued" means any stock that may be subsequently authorized by amendment to the articles of incorporation.⁴¹

Such amendment, however, does not respond to providing the articles of incorporation with the power to limit issues of additional shares. The amendment, rather, adds that this denial of the pre-emptive right will fall on unissued or treasury shares theretofore and thereafter authorized. It can only be conjectured that the point in time of authorization alluded to by the amendment is that time of authorization as specified in the original articles of incorporation. Through the ambiguous phrase "theretofore and thereafter authorized," it may be argued that "theretofore" refers to the original total number of shares of stock authorized, which a corporation may issue by command of the articles of incorporation, which are not outstanding.⁴² It could then be further reasoned that

³⁷ Original Act § 31-1-90.

³⁸ Law of March 10, 1967, ch. 29, § 31-1-6(i) [1967] Acts of the Legislature of West Virginia (repealed 1974).

³⁹ Original Act § 31-1-90.

⁴⁰ Act § 31-1-90.

⁴¹ Act § 31-1-108.

⁴² Act § 31-1-90. "Theretofore" is defined as meaning "up to that time; until then; before then." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2372 (1964).

"thereafter" authorized refers to shares of stock in the original authorization, and at that time, being held in the form of unissued and treasury stock.⁴³ Any additional stock must be authorized by amendment to the articles of incorporation.⁴⁴

Further proof that a distinction must be drawn between unissued or treasury shares and additional shares, and that separate treatment is necessary comes from one source which states that statutes usually give shareholders preemptive rights to any new shares that are to be issued for cash and which would dilute existing voting power or claims to dividends.⁴⁵ The certificate of incorporation may contain provisions granting to stockholders the preemptive right to prescribe to any or all additional issues of stock of the corporation.⁴⁶ Exceptions to the issuance or sale of shares not subject to preemptive rights have often included treasury shares which are resold and all shares authorized in the original certificate of incorporation.⁴⁷

Because this provision is ambiguous, it is necessary to look to another area of the Act. The provision outlining information to be included in the articles of incorporation, after amendment provides an explanation. This section requires that a business corporation include any provision limiting or denying to shareholders the pre-emptive right to acquire additional unissued or treasury shares of the corporation in its article of incorporation.⁴⁸ It does not mention additional shares of stock issued after the basic charter's authorization. Thus, this requirement must be read as negating any provision for the corporation as to denial of pre-emptive rights to purchase additional new issues. Therefore, it is submitted for this provision to have had the proper meaning of denying the pre-

⁴³ The Act defines treasury shares as "shares of a business corporation which have been issued and have been subsequently acquired by and belong to such corporation, and have not, either by reason of the acquisition or thereafter, been cancelled or restored to the status of authorized but unissued shares." Act § 31-1-6(t).

⁴⁴ *MICHIE'S JURISPRUDENCE* tends to agree with the inclusion of additional shares with unissued or treasury shares, by stating that "each of the existing stockholders has the preemptive right to an opportunity to subscribe for or to purchase shares of the new stock in proportion to the original stock held by him" 4B M.J. Corporations § 131 (1974 Replacement Volume).

⁴⁵ C. ISRAELS, CORPORATE PRACTICE § 5.22 (1969).

⁴⁶ *Id.*

⁴⁷ *Id.* at § 5.23.

⁴⁸ Act § 31-1-27 (b)(4).

emptive right to additional shares of stock, the provision should have read: "The articles of incorporation . . . [in] denying to the shareholder of a corporation the preemptive right to acquire unissued or treasury shares theretofore or thereafter *amended* to authorize"

C. DIRECTORS

The Original Act, unchanged by amendment, states the purpose of the board of directors is to manage the business and affairs of a business corporation, unless otherwise provided in the articles of incorporation.⁴⁹ The directors have been allowed by court decisions the broad authority to borrow money, to declare dividends, to enter into loans,⁵⁰ to fix their own compensation,⁵¹ but not to make loans to employees or themselves.⁵²

The Original Act, for both business⁵³ and non-profit corporations,⁵⁴ called for the election by the board of directors of a president, vice president, secretary, and treasurer as officers of the corporation. The section pertaining to business corporations has been amended to delete any reference to a vice president⁵⁵ in order to eliminate the need for a vice president since many small corporations do not have adequate personnel, or the need, for a vice president. A similar change was suggested, but not made, concerning nonprofit corporations. Therefore, it remains mandatory for the board of directors of nonprofit corporations to elect one or more vice presidents.⁵⁶ A basis for this distinction between business and nonprofit corporations may be that the term of office for officers of a nonprofit corporation may be prescribed in the articles of incorporation or the bylaws, not to exceed three years, and absent any provisions, all officers are elected or appointed annually by the board of directors.⁵⁷ However, in business corporations, there is no statutory limit on an officer's term of office, and the manner and

⁴⁹ Original Act § 31-1-95.

⁵⁰ *Corporations* at 78.

⁵¹ Original Act § 31-1-95.

⁵² Act § 31-1-101.

⁵³ Original Act § 31-1-104.

⁵⁴ Original Act § 31-1-142.

⁵⁵ Act § 31-1-104.

⁵⁶ Original Act § 31-1-142.

⁵⁷ *Id.*

time of election is left to the bylaws.⁵⁸ Therefore, the board of directors of a nonprofit corporation could appoint a person to fulfill the vice president position who is also the president or the secretary, and alternate the position of vice presidency every other year between those two persons holding the offices of president and secretary producing no great strain on manpower.

The Original Act provided for indemnification to any director or officer of the corporation for expenses actually or necessarily incurred in defense of any action, civil or criminal, to which he is made a party by reason of his directorship or office, except in relation to matters for which he has been adjudged guilty of negligence or misconduct.⁵⁹ The power to indemnify, prior to amendment, covered one who is, or was, a director, officer, employee or agent of the corporation.⁶⁰ The Special Committee amended this section to extend indemnification to a director, officer, employee or agent serving at the request of the corporation.⁶¹ Therefore, the indemnification of a corporate member has been broadened beyond the immediate corporate walls to include the actions of those persons serving at the request of the corporation.

Shareholders and directors have the right to inspect the books and records of the corporation.⁶² The Original Act, without amendment, granted this right to the shareholder who has been an owner of record for at least six months, or who owns five percent of the outstanding shares. This right is not expressly vested in directors, officers, or committees of the corporation, but the West Virginia Court has recognized such a right.⁶³

An important provision of the Original Act, left unchanged, imposed a penalty against the officer or agent of the corporation who refuses to allow the inspection after a proper purpose has been

⁵⁸ Original Act § 31-1-104. It has been suggested that the statute should be amended to provide for the one man corporation, where, as the Act still provides, the president and secretary must be two separate officers. *Corporations* at 87. The framers of the amendment did not find the situation one requiring amendment.

⁵⁹ Original Act § 31-1-9.

⁶⁰ Original Act § 31-1-9(b).

⁶¹ Act § 31-1-9. This amendment was derived from Delaware corporation law, which extends indemnification to one who "is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture" DEL. CODE ANN. tit. 8, § 145(b) (Revised 1974).

⁶² Original Act § 31-1-105.

⁶³ *Corporations* at 154 n.625.

shown by the shareholder.⁶⁴ In a suggested amendment, the intent of the framers of the amendment was to delete any reference to the personal liability of officers or agents who fail to allow inspection of the books. It was argued the penalty was severe and unnecessary, and liability upon the corporation alone was sufficient.⁶⁵ Opposition to the proposed amendment argued that the original provisions should remain unchanged, thus allowing greater access to the corporate books and records on the theory that even in borderline cases the corporate official would allow inspection rather than incur personal liability. The effect of the more liberal inspection view would save both the corporation and the shareholder the time and costs of litigation.⁶⁶ The language of the Original Act regarding inspection of the corporate books and records was retained intact. By prescribing such penalties, it is unlikely any reasonable request will be refused and the burden of proving an improper purpose in order to defeat a demand rests with the corporation.⁶⁷ A non-profit corporation has the same obligation to allow inspection of the corporation's records for proper reasons.⁶⁸

D. STOCK AND CAPITAL

The Original Act provided the business corporation with the power to create and issue shares of stock, to divide the shares into one or more classes, and to issue no par stock if it is a corporation organized for profit.⁶⁹

The Original Act contained a provision which allowed non-profit corporations to issue shares of stock,⁷⁰ which is a departure from both the past practice of nonstock corporations and the Model Non-Profit Corporation Act, from which the nonprofit sections of the West Virginia Corporation Act were patterned.⁷¹ At the time the Original Act was passed, several problems were anticipated, such as the effect on the nonprofit status of a corpora-

⁶⁴ Original Act § 31-1-105.

⁶⁵ W. Va. State Bar Proposed Amend. to W. Va. Corporation Law at 23 (1975) [hereafter cited as State Bar Proposal], on file with the author.

⁶⁶ *Corporations* at 154.

⁶⁷ 2 MODEL BUS. CORP. ACT ANN. § 52, ¶ 2 (2d ed. 1971). See also *Corporations* at 155 for cases defining the purposes to inspect records.

⁶⁸ Original Act § 31-1-143.

⁶⁹ Original Act § 31-1-78.

⁷⁰ Original Act § 31-1-144.

⁷¹ *Corporations* at 123.

tion actively trading stock for profit, the disappearance of non-profit corporation stock issuances, and the creation of different classes of membership in order that the corporation might achieve any purpose it desired.⁷² These issues were mooted by an amendment to this section which provides for "membership certificates" representing the proportion of ownership of the corporate assets.⁷³ Such certificates do not represent a vote because the power to vote is reserved to the members. In effect, instead of one share, one vote, the rule is one member, one vote, with the number of certificates carrying no voting power. The amendment to this section further provides that all shares of stock in nonprofit corporations now issued and outstanding shall be treated for all purposes as membership certificates. Although amended, the section retains a provision allowing nonprofit corporations to pay reasonable compensation to its members, directors, or officers for services they have rendered, but disallows any payment of dividends.⁷⁴

E. AMENDING ARTICLES OF INCORPORATION

The Original Act allowed the articles of incorporation for business and nonprofit corporations to be amended to include anything which might have been contained in the original articles.⁷⁵ In the case of a business corporation, a resolution urging an amendment of the articles of incorporation must have originated with, and been initially adopted by, the board of directors.⁷⁶ In a situation in which the amendment to the articles of incorporation would affect any particular class of shareholders, the amendment must also have received a majority vote of the shares in that class.⁷⁷ The Original Act further provided for class voting on amendments to the articles of incorporation in nine instances, and a tenth has been added by amendment. The amendment provides a class vote if the amendment to the articles of incorporation will limit or deny the existing preemptive rights of the shares of that class.⁷⁸ When there

⁷² *Id.* at 124.

⁷³ Act § 31-1-144.

⁷⁴ *Id.*

⁷⁵ Original Act §§ 31-1-106 to -146. Contained within § 31-1-106 is a list of fifteen ways a corporation may amend its articles of incorporation.

⁷⁶ Original Act § 31-1-107.

⁷⁷ Original Act § 31-1-107(c).

⁷⁸ Act § 31-1-108(i). The purpose of the amendment was to conform to 2 MODEL BUS. CORP. ACT ANN. § 55, ¶ 1 (1960).

are two or more classes of shares, no formula can be devised to allocate additional shares in a manner that will preserve all the shareholder's relative voting rights, and rights to surplus and future earnings. The only solution to this problem is either to deny or define rights to additional shares by provision in the articles of incorporation, or to amend the articles of incorporation. By amendment to the governing section in the Act,⁷⁹ the original or amended articles may be amended by the prescribed vote of shareholders, with the protection of class voting in suitable instances.⁸⁰ The original Act provided, and has not been amended, for amendments to the articles of incorporation of a nonprofit corporation.⁸¹ Such amendments may be adopted directly by a majority vote of all the directors in office if there are no members or member entitled to vote; otherwise, a majority of the members present is required.

Subsequent to proper adoption of an amendment to a business corporation's articles of incorporation, the original Act required filing of the amendment with the Secretary of State.⁸² The Original Act has been amended to require the inclusion of the name and address of the person who, or the firm which prepared the amendment.⁸³ The identical provision was added to the Original Act's requirements concerning the preparation of the articles of amendment for the nonprofit corporation.⁸⁴ This procedure insures a greater degree of accountability and responsibility for the drafting of the articles of amendment. The Original Act allowed the corporation to place the amendment to its articles of incorporation into the original articles merely by a resolution adopted by the board of directors.⁸⁵ This is a restatement of the corporate charter and all the amendments to the charter.

The Original Act provided a procedure for restatement of the

⁷⁹ Act § 31-1-108.

⁸⁰ 1 MODEL BUS. CORP. ACT ANN. § 24, ¶ 4 (1960).

⁸¹ Original Act § 31-1-147.

⁸² Original Act § 31-1-109. This section lists five areas of information the Secretary of State requires in order to file an amendment of the articles of incorporation. It is modeled after 2 MODEL BUS. CORP. ACT ANN. § 62, ¶ 1 (2d ed. 1971).

⁸³ Act § 31-1-109(h).

⁸⁴ Act § 31-1-148(e). Sections one hundred nine and one hundred forty-eight are similar to the Model Act except that the Model Act makes no provision for the name and address of the draftsmen of the articles of amendment. The West Virginia Act does make such provision. 2 MODEL BUS. CORP. ACT ANN. § 55 (1960).

⁸⁵ Original Act § 31-1-110.

articles of incorporation of a nonprofit corporation,⁸⁶ which was dissimilar to both the restatement procedure for business corporations⁸⁷ and the pre-Original Act procedure for non-profit corporations.⁸⁸ The purpose of the restated articles is to consolidate the original articles of incorporation and all the amendments that have been made to the articles into a new articles of incorporation. This is usually done after a large number of amendments have been added to the original articles of incorporation. As each amendment was added to the articles of incorporation, it had to be passed by a vote of the membership. The Original Act provided that the restated articles of incorporation were to be adopted by the board of directors and if any members were entitled to vote on the restated articles of the nonprofit corporation, they should vote.⁸⁹ The problem then arises, and has not been corrected by amendment, that the membership has voted on the amendments to the original articles of incorporation and upon voting on the restatement of the articles of incorporation they are readopting amendments they previously approved. Therefore, the membership could defeat restatement of the articles of incorporation and not affect the original amendments that had previously been adopted by the membership as each amendment arose. In order to avoid this situation, the Special Committee suggested an amendment to the Original Act which would provide for the insertion of a provision in either the bylaws or articles of incorporation disallowing voting by members of the corporation not entitled to vote upon a proposed restatement of the articles which contains no new amendments.⁹⁰ Thus, the amendment concerning the nonprofit corporation adopted verbatim the procedure required for restatement of the articles of incorporation for a business corporation.⁹¹ The framers of the amendment desired to permit articles of incorporation, when unchanged, to be restated by the board of directors without the necessity of a vote of the membership, the same procedure set forth for business corporations. There is no justification to require the

⁸⁶ Original Act § 31-1-149.

⁸⁷ Original Act § 31-1-110.

⁸⁸ Law of February 28, 1967, ch. 30, § 31-1-7a [1967] Acts of the Legislature of West Virginia (repealed 1974).

⁸⁹ Original Act § 31-1-149.

⁹⁰ State Bar Proposal at 25.

⁹¹ Act § 31-1-149.

expense and possible failure required by a vote of the members to simply restate existing articles and amendments.⁹²

F. CORPORATE COMBINATIONS

The Original Act provided specific guidelines concerning the procedure for combining two or more separate corporations by merger or consolidation. The procedure for each is basically identical, the only difference being the outcome of the transaction. In a merger, one corporation continues by merging within itself another corporation, the latter ceasing to exist. In a consolidation, all of the constituent corporations join together and disappear into a new consolidated corporation.⁹³

The mechanics of such combinations, as outlined by the Original Act, required adoption, by the board of directors of each corporation, of a resolution approving a plan of merger. Approval could be achieved through vote by a majority of the shares entitled to vote on the issue. Abandonment of the proceedings could occur if a plan for such action is set forth in the plan of merger and abandonment is done prior to the filing of the articles of merger or consolidation.⁹⁴ The portions of the Original Act dealing with merger and consolidation have been amended to require, before execution of the articles of consolidation or merger, approval by the shareholders, in the case of a business corporation, and the members, in the case of a nonprofit corporation.⁹⁵ The purpose of the amendment was not to change the meaning of the section, but to clarify who must approve the articles of consolidation or merger.

An alternative to statutorily-approved combinations is the sale or exchange of substantially all the assets of one corporation to another corporation, other than might be done in the usual and regular course of business. The procedure is similar to that provided by the Act: through resolution by the directors, shareholders' vote, and an option to abandon.⁹⁶

A suggested amendment to the Act would have changed the original requirement that in a merger or consolidation, deeds had

⁹² State Bar Proposal at 25.

⁹³ Original Act §§ 31-1-34 to -35. *See also Corporations* at 129-41.

⁹⁴ Original Act § 31-1-117.

⁹⁵ Original Act §§ 31-1-36, -117, -150.

⁹⁶ Original Act § 31-1-121.

to be prepared conveying to the surviving or consolidated corporation any real estate held by any of the constituent corporations.⁹⁷ Supporters of the suggested change found the original requirements time consuming, complicated, expensive and totally unnecessary.⁹⁸ The framers of the amendments found no need to alter any provisions concerning real estate conveyances after combination and did not adopt the proposed amendment.⁹⁹

G. DUTIES OF THE SECRETARY OF STATE

The Original Act contained a "long arm statute" identical to the previous corporation statute, with the only significant difference being the replacement of the Auditor by the Secretary of State as attorney in fact in West Virginia for all corporations, whether domestic or foreign.¹⁰⁰ That provision has been retained without amendment.

In an effort to reach the same result, the Model Business Corporation Act provides for a registered agent to be appointed by a foreign corporation authorized to transact business in the state, and any notice, process, or demand to be served upon the corporation may be served upon the registered agent.¹⁰¹ The Model Act further provides that the Secretary of State can only be served: (1) when the qualified foreign corporation fails to appoint or maintain a registered agent, (2) if the registered agent cannot be found with reasonable diligence at the corporation's registered office, or (3) if the certificate of authority of a foreign corporation is suspended or revoked.¹⁰² The original West Virginia Act bypassed the foregoing cumbersome procedure of the Model Act, and designated the Secretary of State as attorney in fact on behalf of every foreign corporation authorized to conduct business within the state, and also to accept service of notice or process on behalf of an unauthorized foreign corporation transacting business within West Virginia.¹⁰³

The "registered agent" concept is burdensome.¹⁰⁴ For in-

⁹⁷ Original Act § 31-1-37(b).

⁹⁸ *Corporations* at 133.

⁹⁹ Original Act § 31-1-37(b).

¹⁰⁰ Original Act § 31-1-15; Law of March 7, 1969, ch. 20, § 31-1-71 [1969] Acts of the Legislature of West Virginia (repealed 1974).

¹⁰¹ 2 MODEL BUS. CORP. ACT ANN. § 115, ¶ 2 (2d ed. 1971).

¹⁰² *Id.*

¹⁰³ Original Act § 31-1-15.

¹⁰⁴ 2 MODEL BUS. CORP. ACT ANN. § 12, ¶ 2 (2d ed. 1971).

stance, each corporation under the Model Act would be required to have and continuously maintain a registered office which may be, but need not be, the same as its principal office, and to maintain a registered agent, whose address must be identical with its registered office. These requirements are based on the premise that it should be possible, at all times, to maintain contact with a corporation and to have a person upon whom, and a place at which, any notice or process may be served. The registered office or agent, or both, under the Model Act, could be changed only by filing a statement of the change with the Secretary of State.¹⁰⁵

To insure that West Virginia may avoid the registered agent requirement, but retain the basic premise behind the concept, the Secretary of State is in effect the registered agent of all foreign corporations.¹⁰⁶ The Secretary of State, then, needs a definite person, at a definite address, at all times available, upon whom notice and process may be served. By amendment, the Act now provides a registered or certified mailing of the process or notice to the name and address last furnished to the Secretary of State, at the place authorized by statute to accept service. If no such person has been named, the process is mailed to the principal office of the corporation at the address last furnished to the state officer at the time authorized by statute to accept service.¹⁰⁷ The purpose of this amendment to the Original Act is to expressly provide a substitute for the corporate service companies operating within some states, including West Virginia, such as C. T. Corporation System, Prentice-Hall, or U.S. Corporation System. These corporate services furnish definite persons, either individual or corporate, to serve as registered agents. In West Virginia, the corporate services did not provide registered agents, but rather persons to whom, under the Original Act, the Secretary of State could mail or send notice of process after it was served on the Secretary of State. Thus, prior to amendment, a corporation in conjunction with a corporate service, could make careful provisions to see that such notice was received.¹⁰⁸

¹⁰⁵ *Id.* at § 13 ¶ 1.

¹⁰⁶ Act § 31-1-15.

¹⁰⁷ *Id.* A further amendment to this section now requires a fee of two dollars to the Secretary of State for filing in his office a copy of a process or notice, and transmitting a copy of the process or notice by registered or certified mail to the corporation.

¹⁰⁸ State Bar Proposal at 6.

Therefore, in West Virginia, the widespread practice of the Secretary of State serving process upon a corporate service company who then insured proper service on the corporation has been codified to provide for service to either a person representing the corporation or the principal office of the corporation.

This amendment, however, has created a problem with those corporations filing only a last known address with the Auditor, a proper procedure before the Act.¹⁰⁹ Under the Act, as amended, the Secretary of State has no definite, lawful place to send notice and process.¹¹⁰ This problem will be a continuing one until all corporations have filed with the Secretary of State the name of a person upon whom, or the address of the principal office of the corporation where, process may be served. There has been no indication of amendment to correct this problem of conversion from what the Auditor requires, to that information now due the Secretary of State. Corporations formed subsequent to the effective date of the Original Act as amended will, of course, have no difficulty in meeting these requirements.¹¹¹

The amendments to the Original Act made extensive changes in the Secretary of State's duties.¹¹² One of the purposes of the amendments was to require all corporations to file annual reports with the Secretary of State in order to provide the Secretary of State with the information required for the acceptance of service of process, and to keep the corporation records current.

The original provision of the Act instructed a foreign corporation authorized to conduct affairs or to do or transact business in West Virginia, wishing to change its principal office, to file a statement in the office of the Secretary of State. The statement was to set forth the name of the corporation, the address of its then principal office, the address to which the principal office was to be changed, and that the change was authorized, by a resolution duly adopted by the corporation's board of directors. The statement was required to be filed within ten days after the change, and the change of the principal office was not considered consummated

¹⁰⁹ Law of March 7, 1969, ch. 20, § 31-1-71 [1969] Acts of the Legislature of West Virginia (repealed 1974).

¹¹⁰ Act § 31-1-15.

¹¹¹ Act § 31-1-27(a)(4).

¹¹² Act §§ 31-1-56 to -56b.

until the filing.¹¹³ By rewriting this section, the amendment now provides for the appointment of a person to whom the Secretary of State may send notice or process,¹¹⁴ and the procedure by which a corporation may change this person or the address of its principal office.¹¹⁵

To appoint such a person to receive process, as required by the amendment, the corporation must file with the Secretary of State a Statement setting forth the name of the corporation and the state of its incorporation, the present address of its principal office, the name and address of the person to whom the Secretary of State shall send all notices and process, and the authorization of the individual's appointment by the corporation's board of directors. This statement must be signed by either the president, vice president, secretary, or assistant secretary, be verified by the signer, and be delivered to the Secretary of State.¹¹⁶

The procedure for changing the address of the corporation's principal office, or the name or address of the person responsible for receiving notice or process, by amendment to the Original Act, requires a similar response. Under the amendment, the corporation must file, in the office of the Secretary of State, a statement setting forth the name of the corporation, the State wherein incorporated, the address of the former or present principal office, and the address to which it is changed. Further, the statement must include the name and address only, of the person to whom notice or process is to be sent, and a statement that such changes have been adopted by the board of directors; be signed by the president, vice president, secretary or assistant secretary of the corporation; and be verified by the signer.¹¹⁷ The Act originally required only the signature of the president or vice president on the statement.¹¹⁸ Therefore, allowing the signatures of either the secretary or assistant secretary significantly broadens the authority and personal

¹¹³ Original Act § 31-1-56. The purpose behind the amendment to this section was to provide a system whereby the Secretary of State will receive service of notice or process for a foreign corporation, Act § 31-1-15, and then by express provision will have a person or principal office to which notice or process may be sent. Act § 31-1-56.

¹¹⁴ Act § 31-1-56a.

¹¹⁵ Act § 31-1-56b.

¹¹⁶ Act § 31-1-56a.

¹¹⁷ Act § 31-1-56b.

¹¹⁸ Original Act § 31-1-56.

responsibility of those persons who sign and verify the statement to be a true and valid representation of the board of directors.

The change of a person or the principal office designated to receive notice or process is a routine matter which does not affect the rights of shareholders, and in which they need not act. For this reason, the change may be authorized by a resolution of the board of directors. The amendment to the Act prevents a foreign corporation from transacting business within the state, committing torts against its residents, and then by failure to maintain an agent within the state, escape the jurisdiction of the state courts. The Act, as amended, provides the Secretary of State with the power to accept notice or process and send it directly to a person appointed by the corporation,¹¹⁹ or to the principal office of the corporation.¹²⁰ Through these provisions, answers have been provided to the two basic questions raised by the Model Corporation Act: (1) whether a proper representative of the corporation has been served as required by law, and (2) whether the service on a representative will result in adequate notification to the corporation.¹²¹

Before a foreign corporation is within the scope of state jurisdiction, there must be some minimum contact with the forum state, such that the service of process upon the corporation in the forum state is consistent with traditional notions of substantial justice and fair play. Courts have held that the facts and circumstances of each case must govern in deciding whether the activities of the corporation have met the minimum contact test.¹²² The Act, as amended, has not provided for this situation, but rather, has left it to court interpretation.

A further important amendment to the Original Act concerns

¹¹⁹ Act § 31-1-15.

¹²⁰ *Id.*

¹²¹ 1 MODEL BUS. CORP. ACT ANN. § 14, ¶ 2 (2d ed. 1971). The theory of the Model Act is that there be no time when a domestic corporation cannot readily be found in the state of incorporation to which end section fourteen of the Model Act establishes the registered agent as an agent upon whom any process, notice, or demand required or permitted by law may be served upon the corporation. Section fourteen further provides for alternative service on the Secretary of State, which in West Virginia also serves the function of a registered agent and is what has been adopted.

¹²² *State ex rel. Coral Pools, Inc. v. Knapp*, 147 W. Va. 704, 713, 131 S.E.2d 81, 87 (1963). This holding was later reiterated in *Hodge v. Sands Manufacturing Co.*, 151 W. Va. 133, 150 S.E.2d 793 (1966).

the filing of annual reports with the Secretary of State.¹²³ The requirement of annual reports submitted to the Secretary of State was not provided for in the pre-Act days. The Original Act required domestic and foreign business corporations, authorized to conduct affairs or transact business in West Virginia, to file annual reports of its past year's activities.¹²⁴ By amendment, all corporations are required to file uniform annual reports with the Secretary of State and the Tax Commissioner.¹²⁵

The annual report must set forth the name of the corporation; the state or county of incorporation; the address of its principal office; and if one has been appointed, the name and address of the person to whom the Secretary of State shall send notice and process; a brief statement of the character of the affairs which the corporation is actually conducting, or the business it is doing or transacting in this state; and the names and respective addresses of the directors and officers of the corporation. A foreign corporation in its annual report is required to submit in addition, the date of incorporation, the date of the certificate of authority from the Secretary of State authorizing the corporation to do business in the state, and the name of the officer, if any, charged with the duty of making returns of its property for taxation. The annual report must also include statements of par value of shares of authorized capital stock, information regarding shares of authorized capital stock with no par value, information concerning property owned and used by the corporation within this state, and the proportion of its capital stock that is represented by property owned and used in West Virginia.¹²⁶

The amended Act requires all annual reports to be made on forms prescribed and furnished by the Secretary of State. The reports must contain information current to the date of the execution of the report and verified by either the corporation's president, vice president, secretary, treasurer, assistant secretary, assistant treasurer, or a receiver or trustee, if the corporation is in the hands of such a party.¹²⁷

¹²³ Act § 31-1-56a.

¹²⁴ Original Act § 31-1-159.

¹²⁵ Act § 31-1-56a.

¹²⁶ Act § 31-1-56a(a).

¹²⁷ Act § 31-1-56a(b).

All annual reports are further required by the amendment to be delivered to the Secretary of State and the Tax Commissioner in duplicate between the first day of January and the thirty-first day of March of each year, except in the case of a new corporation. The new corporation will follow the same procedure, but will delay filing until the year following incorporation. To comply with the amended Act, the report must be deposited in the United States mail prior to the thirty-first day of March, contained within a sealed envelope, and properly addressed to the Secretary of State and the Tax Commissioner, with postage prepaid. The Secretary of State then decides if the reports conform to requirements, and if the decision is negative, the report will be returned to the corporation for corrections. The corrected form must be resubmitted to the Secretary of State and Tax Commissioner within thirty days.¹²⁸

The Act, by amendment, imposes penalties on domestic and foreign corporations for failure or refusal to file an annual report, or corrected annual report, for three successive years.¹²⁹ Notice of this failure is to be sent to the corporation's appointed personal representative, or the principle office, by certified or registered mail, return receipt requested. This notice serves to inform the corporation that if it fails to file all annual reports due within thirty days after receipt of the notice, the corporation will be subject to an order of dissolution if it is a domestic corporation, or an order revoking its certificate of authority, if it is a foreign corporation. The notice also advises the corporation of its right to a hearing, and will set forth the date and time of the hearing to be held in the office of the Secretary of State and conducted by the Secretary of State or his designee. At the hearing, the corporation has an opportunity to explain its reasons for failure to file the required reports. If the corporation fails to file the report within the thirty day period, fails to appear at the hearing, or appears at the hearing but fails to satisfy the Secretary of State, an order is issued dissolving the corporation or revoking a foreign corporation's certificate of authority.¹³⁰

¹²⁸ Act § 31-1-56a(c). This section does not expressly state when the thirty day period begins to run within that time that the corporation must correct the annual report and return it to the Secretary of State and Tax Commissioner, but it seems logical to assume thirty days from the corporation's receipt of the annual report to be corrected.

¹²⁹ Act § 31-1-56b.

¹³⁰ The obvious question then becomes the fairness of allowing the Secretary

An appellate procedure is also supplied by the amendment for the corporation dissatisfied with the Secretary of State's ruling.¹³¹ The corporation may appeal to the circuit court in the county wherein its principal office is located or in the Circuit Court of Kanawha County if the principal office is located outside the State. The appeal must be taken within thirty days following written notice of the ruling, and must be by petition for writ of certiorari. The corporation or person aggrieved may appeal the circuit court's ruling to the West Virginia Supreme Court of Appeals.¹³²

On its face, the amendment specifying penalties for failure to file an annual report may appear to conflict with those sections of the Original Act dealing with the business registration tax. However, the relevant license tax sections of the Original Act have been amended to conform to the annual report requirements.¹³³ The amendment to the original license tax provisions requires that a domestic or foreign corporation which has qualified to hold property or do business in West Virginia must file two copies of the annual report by the thirty-first day of March, of each new year, and submit the report to the Tax Commissioner.¹³⁴ The amendment further provides that it is the duty of the Tax Commissioner to notify each corporation of the amount of tax owed. Payment of the license tax is to be accompanied by a report, transcribed on forms provided by the Tax Commissioner's office, a copy of which is forwarded to the Secretary of State. If the license tax is not paid,

of State to be both accuser and trier of fact. The point is that an appellate procedure is supplied where the corporation may appeal directly to the appropriate circuit court. An analogy, therefore, can not be drawn to the situation of appealing a tax decision ruled by the tax commissioner, who truly sits as both accuser and trier of fact. In a tax assessment dispute, the taxpayer must petition to the tax commissioner to appeal the ruling. W. VA. CODE ANN. § 11-12-14 (1974 Replacement Volume).

¹³¹ Original Act § 31-1-68.

¹³² Original Act § 31-1-68(b).

¹³³ W. VA. CODE ANN. §§ 11-12-80 to -86 (Cum. Supp. 1974).

¹³⁴ *Id.* at § 11-12-80. It is important to note at this point that there are two types of reports required for submission to the Tax Commissioner. Domestic and foreign corporations must file with the Tax Commissioner an annual statement, at the same time the license tax is paid. This is submitted on forms provided by the Tax Commissioner, in duplicate, and one copy is forwarded to the Secretary of State. W. VA. CODE ANN. § 11-12-83 (Cum. Supp. 1975). Secondly, domestic and foreign corporations file an annual report with the Tax Commissioner, in duplicate, as required by Act § 31-1-56a, and the purpose of this report is to provide information upon which the Secretary of State may act, but the Tax Commissioner cannot.

it is deemed a debt owed the state for which the state has a lien superior to all but property tax liens levied by the state, county, or district.¹³⁵ The amended Act also provides that if the corporation continues to be delinquent, the Tax Commissioner certifies that fact and turns the matter over to the Attorney General to bring a civil action to revoke the certificate of authority or the authority to do business.¹³⁶

Therefore, the overall purpose of these amendments to the Original Act has been to provide consistency and accuracy in a previously disorganized procedure. All corporations are now required to file uniform annual reports with the Secretary of State and the Tax Commissioner,¹³⁷ while in the past, various forms were filed with the Auditor.¹³⁸ The annual reports serve to update the corporate records and provide the Secretary of State the information necessary to accept service of process and notice.

The practical effect on business corporations of requiring annual reports is small, since such corporations were to file similar reports with the Tax Commissioner under the Original Act in order to meet license tax provisions.¹³⁹ The penalty of charter forfeiture for failure to pay the tax was mandated under present tax law,¹⁴⁰ and prior corporation law.¹⁴¹ The purpose of the amendments was to give the Secretary of State a remedy in order that he may require annual reports to be filed. Thus a business corporation may be dissolved by civil action brought by the Attorney General after public proclamation of delinquency by the Governor of West Virginia.¹⁴² Dissolution may also occur under the power granted to the Secretary of State upon failure of the corporation to submit annual reports for three consecutive years.¹⁴³ Therefore, the Secretary was granted the power to dissolve a corporation or revoke a certificate

¹³⁵ *Id.* at § 11-12-83.

¹³⁶ W. VA. CODE ANN. § 11-12-86 (1974 Replacement Volume).

¹³⁷ W. VA. CODE ANN. § 11-12-80 (Cum. Supp. 1975). It was the intention of the framers of the amendment that the reports of the Secretary of State and Tax Commissioner compliment each other. State Bar Proposal at 19.

¹³⁸ Law of March 7, 1969, ch. 20, § 31-1-71 [1969] Acts of the Legislature of West Virginia (repealed 1974).

¹³⁹ W. VA. CODE ANN. § 11-12-83 (1974 Replacement Volume).

¹⁴⁰ W. VA. CODE ANN. § 11-12-86 (1974 Replacement Volume).

¹⁴¹ Law of March 7, 1945, ch. 145, § 11-12-86 [1945] Acts of Legislature of West Virginia (repealed 1974).

¹⁴² W. VA. CODE ANN. § 11-12-86 (1974 Replacement Volume).

¹⁴³ Act § 31-1-56b.

of authority, regardless of whether it is a business or nonprofit corporation.

The impact on nonprofit corporations is substantial. The amendments requiring annual reports and imposing penalties, furnish a means whereby the several thousand nonprofit corporations which have for years been dormant because of the lack of any method to dispose of them, can now be removed from the records. A nonprofit corporation's license can, under the amended Act, be revoked by the Secretary of State for failure to file an annual report for three consecutive years.¹⁴⁴ This procedure is fair to the nonprofit corporation because it is provided that, before revocation may be completed, a notice and hearing must be granted.¹⁴⁵

IV. DISSOLUTIONS

A. VOLUNTARY DISSOLUTIONS

The Original Act made many substantive and procedural changes in the prior corporate law of dissolutions.¹⁴⁶ The Original Act provided, after the decision to dissolve was reached, that the corporation file an initial statement of intent to dissolve with the Secretary of State, liquidate the assets and business of the corporation, and, finally, file the articles of dissolution.¹⁴⁷ The Original Act contained three basic sections providing for the voluntary dissolution of the business corporation. The first section permitted dissolution upon the unanimous written consent of all the shareholders,¹⁴⁸ the second allowed dissolution after recommendation of the board directors and majority vote of the shareholders,¹⁴⁹ and the third, dissolution by the incorporators, provided the corporation had not commenced business or issued stock.¹⁵⁰

The dissolution process is not an impassive process and at any time, prior to the issuance of the certificate of dissolution by the Secretary of State, the dissolution could be stopped under the Original Act, should it become desirable to continue the corporate existence. The statement of intent to dissolve was revocable by

¹⁴⁴ Act §§ 31-1-56a, -56b.

¹⁴⁵ Act § 31-1-56b.

¹⁴⁶ *Corporations* at 162-63.

¹⁴⁷ *Id.* at 162.

¹⁴⁸ Original Act § 31-1-125.

¹⁴⁹ Original Act § 31-1-126.

¹⁵⁰ Original Act § 31-1-124.

written consent of the shareholders,¹⁵¹ or by an act of the corporation.¹⁵² The latter provision, for revocation by an act of the corporation was identical to the Model Business Corporation Act, except that the Model Act contained procedures pertaining to the shareholders' participation in deciding the question of revocation, whereas the Original Act lacked any such procedure.¹⁵³ At the time the Original Act was drafted, there seemed to be little reason for the omission of the shareholders' function in the possible revocation of a dissolution proceeding, but the procedure adopted provides that the corporation may revoke voluntary dissolution proceedings by resolution of the board of directors and affirmative vote of the shareholders.¹⁵⁴

However, the original procedure disallowing shareholder input in initiating a revocation of the dissolution has been amended to allow the shareholders to vote on the question of revocation of the dissolution process. If the resolution affirming revocation of the dissolution proceedings is adopted, it is provided that a statement of revocation of voluntary dissolution shall be executed by the president, or vice president, and by the secretary or assistant secretary, with verification by one of the officers signing the statement. The statement sets forth the name of the corporation, names and addresses of the officers, names and addresses of the directors, a copy of the resolution adopted by the shareholders, the number of shares outstanding, and the number of shares voting for and against the resolution.¹⁵⁵

¹⁵¹ Original Act § 31-1-130.

¹⁵² Original Act § 31-1-131.

¹⁵³ 2 MODEL BUS. CORP. ACT ANN. § 89, ¶ 1 (2d ed. 1971).

¹⁵⁴ Original Act § 31-1-131(a)-(b).

¹⁵⁵ Act §§ 31-1-131(c), -(d). In a complete discussion of the Original Act, it would be necessary to include the concept of involuntary dissolution. The provisions of the Act relating to this area have not been amended to any extent. The only amendment concerns recordation of the court's order to dissolve. The clerk of the circuit court files a certified copy of the order with the Secretary of State. Then, by Act § 31-1-46, after amendment, in addition to filing a copy with the Secretary of State, a certified copy of the order must also be recorded in the office of the clerk of the county commission in which the certificate of incorporation is recorded. The county clerk will make a marginal notation in the record book, in which the certificate of incorporation is transcribed, of the dissolution of the corporation. The amendment further provides that upon such recordation, the existence of the corporation shall cease. Furthermore, no fee may be charged by the Secretary of State or county clerk for the filing or recording of the dissolution.

B. NONPROFIT CORPORATIONS

The dissolution process for the nonprofit corporation varies from dissolution of the business corporation as provided by the Original Act. As with business corporations, dissolution may be voluntary¹⁵⁶ or involuntary, upon the presentation of sufficient cause, but with one additional ground. In the case of a nonprofit corporation, dissolution is available if a member can prove the corporation is unable to carry out the purpose for which it is formed.¹⁵⁷

The Original Act contained a survival statute with a remedy available to, or against, the corporation, its shareholders, members, directors and officers, for any claim existing, or liability incurred, prior to dissolution, if the action was commenced within two years from the date of dissolution.¹⁵⁸ This section has been amended to permit the shareholders of a defunct corporation to elect, if necessary, a new board of directors after the expiration or dissolution date to complete the affairs of the corporation. In addition, the directors remaining in office may fill any vacancies in the board of directors and in any executive office, by election or appointment.¹⁵⁹ This amendment remedies the Original Act's failure to meet the problem posed by the common law rule that a corporation could not sue or be sued after dissolution. As a consequence of this rule, a body of equity law developed allowing suits to be brought against directors and shareholders of a dissolved corporation on the principle of tracing the funds of the corporation. Ultimately, every jurisdiction adopted statutes allowing an action to be brought by, or against, a dissolved corporation, and preventing actions from abating upon voluntary and involuntary dissolutions, or charter expirations. The authors of the Model Business Corporations Act, realizing the need to meet this problem, offered a solution.¹⁶⁰ But the West Virginia solution, by amendment to the Original Act, goes beyond the Model Act by providing for the election of a new board of directors by the shareholders.¹⁶¹

¹⁵⁶ Original Act §§ 31-1-154, -155.

¹⁵⁷ Original Act § 31-1-41.

¹⁵⁸ Original Act § 31-1-48.

¹⁵⁹ Act § 31-1-48.

¹⁶⁰ 2 MODEL BUS. CORP. ACT ANN. § 105, ¶ 2 (2d ed. 1971).

¹⁶¹ Act § 31-1-48. It was stated in the State Bar Proposal that § 31-1-48, as amended, was to be an extension of Law of March 8, 1957, ch. 22, § 31-1-83 [1957]

V. FOREIGN CORPORATIONS

The Original Act contained extensive and detailed provisions concerning foreign corporations in order to give the state greater control and regulatory powers over such corporations, and to provide protection to the citizens of West Virginia in their dealings with these corporations.¹⁶² Under the Original Act a foreign corporation must procure a certificate of authority before it has the legal right to conduct affairs or transact business in West Virginia.¹⁶³ There is no statutory provision defining "transacting business," but the courts have found it to include corporate activities of a local character that are wholly separate from interstate commerce, and are the type of character of business activities for which it was created.¹⁶⁴

Although the Original Act did not define "transacting business," it did enumerate twelve different activities that were *not* to be considered doing or transacting business in the state when conducted by a foreign corporation.¹⁶⁵ By amendment, this list of activities has been expanded.¹⁶⁶ The amendment lists activities exclusively related to securing loans on real or personal property situated in West Virginia. Therefore, a foreign corporation is not to be considered transacting business when engaged in: (1) acquisition of loans secured by mortgages or deeds of trust on real or personal property situated in West Virginia; (2) the ownership, modification, renewal, extension, transfer or foreclosure of such loans; (3) the maintenance or defense of any actions or suits relative to such loans, mortgages or deeds of trust; (4) the maintenance of bank accounts in West Virginia banks in connection with the collection or servicing of such loans; (5) the making, collecting and servicing of such loans through a resident person, firm or corporation; (6) the acquisition of title to property under foreclosure sale; (7) the taking of deeds to mortgaged property in lieu of foreclosure; (8) the management, rental, maintenance and sale of property acquired under foreclosure or agreement in lieu of foreclo-

Acts of the Legislature of West Virginia (repealed 1974), which carried the same provision for filling vacancies as the Original Act. W. VA. CODE ANN. § 31-1-48 (Cum. Supp. 1974); State Bar Proposal at 9.

¹⁶² *Corporations* at 183-202.

¹⁶³ Original Act § 31-1-49(a).

¹⁶⁴ *Corporations* at 187.

¹⁶⁵ *Id.*

¹⁶⁶ Act § 31-1-49(d).

sure; (9) physical inspections and appraisals of property in West Virginia as security for deeds of trust or mortgages; (10) and finally, any other activities necessary to accomplish those enumerated. The amendment further provides that if property is acquired by taking the title in lieu of foreclosure, or by foreclosure, or if upon taking title one manages, rents, and maintains the property in excess of five years, then those activities will be deemed transacting business within the state from that time forth.

As provided in the Original Act, the procedure that a foreign corporation was required to follow in order to procure a certificate of authority was to make application on forms furnished by the Secretary of State,¹⁶⁷ setting forth certain information similar to that required in the articles of incorporation for a business corporation,¹⁶⁸ in order for the Secretary of State to make determinations of its qualifications.¹⁶⁹ This section has been amended to conform with the overall change, throughout the Act, requiring the corporation to provide the name and address of a person to whom the Secretary of State may send the notice or process that has been accepted by the Secretary.¹⁷⁰ In the case of a foreign business corporation, the Original Act provided that the application include additional information, such as the aggregate number of shares the corporation may issue, par value and no-par value shares, and information concerning the stated capital of the corporation.¹⁷¹ The Secretary of State then makes the determination of whether a certificate of incorporation should be issued. The basic reasoning behind this amended procedure is ultimately to provide the citizens of the state greater protection against fraudulent practices of unfamiliar foreign corporations.¹⁷²

The Act originally provided that upon issuance and recordation of the certificate of authority, a foreign corporation could

¹⁶⁷ Original Act § 31-1-53(c).

¹⁶⁸ Act § 31-1-27.

¹⁶⁹ Original Act § 31-1-53. It was necessary to submit such facts as the name of the corporation, the state in which it was incorporated, the date of incorporation, the period of duration, the address of its corporate home office, the address of its principal office within the state of West Virginia, its purpose for doing business within the state, the names and addresses of its directors and officers, and other appropriate information.

¹⁷⁰ Act § 31-1-53(a)(5).

¹⁷¹ Original Act § 31-1-53(b).

¹⁷² *Corporations* at 193.

transact business in West Virginia.¹⁷³ By amendment, the requirement of recording the certificate of authority before the corporation may transact business has been deleted.¹⁷⁴ The section originally provided that a failure to comply with recording requirements within six months from the date of issuance of a certificate of authority subjected the corporation to a maximum fine of one thousand dollars.¹⁷⁵ The framers of the amendment suggested that making the authority of a foreign corporation to do business in West Virginia dependent upon recordation of its certificate of authorization was too severe. The penalty of one thousand dollars for failure to record the certificate of authority was sufficient punishment.¹⁷⁶ This section, as amended, is identical with the Model Business Corporation Act.¹⁷⁷

One important aspect in the Original Act's coverage of a foreign corporation's rights and privileges hinged on the reservation of power to the Secretary of State to revoke a foreign corporation's certificate of authority in certain circumstances.¹⁷⁸ Those conditions, which if not met could result in revocation, included the corporation's failure or refusal to file with the Secretary of State any amendments to its articles of incorporation or any articles of merger, or any misrepresentation of any material matter in an application, report, affidavit, or other document submitted by the corporation. Another situation resulting in revocation concerned the failure of the corporation, after a change of its principal office, to file in the office of the Secretary of State a statement of the change.¹⁷⁹ This latter requirement has been amended to conform with the requirements of submitting an annual report at the beginning of each year to the office of the Secretary of State.¹⁸⁰ Also made applicable, by amendment, to foreign corporations is the penalty of revocation of the corporation's certificate of authority for failure to file an annual report in three successive years, the revocation occurring only after notice and an opportunity for hear-

¹⁷³ Original Act § 31-1-55.

¹⁷⁴ Act § 31-1-55.

¹⁷⁵ Original Act § 31-1-54.

¹⁷⁶ State Bar Proposal at 12.

¹⁷⁷ 2 MODEL BUS. CORP. ACT ANN. § 105, ¶ 1 (1960).

¹⁷⁸ Original Act § 31-1-62.

¹⁷⁹ Original Act § 31-1-62(a)(1).

¹⁸⁰ Act § 31-1-62(a)(1). This is almost identical to the provision set forth in 2 MODEL BUS. CORP. ACT ANN. § 114, ¶ 1 (1960).

ing is given. Therefore, the foreign corporation is treated no differently from the business and nonprofit corporations in this respect.

The section of the Original Act dealing with foreign corporations has been further amended to provide that the Secretary of State cannot revoke a certificate of authority unless he gives the corporation at least sixty days notice by registered or certified mail, addressed to the corporation's principal office or a person appointed by the corporation.¹⁸¹ The Act originally provided that if the corporation had no principal office in this state, notice of revocation should be mailed to the principal office outside West Virginia.¹⁸² By providing a principal office only for the purpose of sending notice, the framers of the amendment were able to avoid the uncertainty of determining where to send the notice by treating all corporations as having only one principal office.¹⁸³ The Secretary of State cannot revoke the certificate of authority until all conditions are met: sixty days notice and corporate failure to file any amendments to the articles of incorporation or any articles of merger, failure to correct any misrepresentations, or failure to file an annual statement.¹⁸⁴

Upon revocation of the foreign corporation's certificate of authority, the Original Act required the Secretary of State to issue an order of that fact and mail it to the principal office, either in West Virginia or out of state.¹⁸⁵ The corporation then had thirty days to appeal the action of the Secretary of State¹⁸⁶ to the circuit court of the county in which the principal office of the corporation was located, or proposed to be located, or if the principal office was located outside of West Virginia, to the Circuit Court of Kanawha County.¹⁸⁷ At first glance, preserving this section intact seems to conflict with the amended section, wherein any reference to an out of state principal office is deleted in order to treat all corporations as having only one principal office. A further reading, however, suggests that regardless of the location of the principal office, after a location is determined, the procedure for appeal as defined by the unamended section of the Act is clearly congruent.

¹⁸¹ Act § 31-1-62(b)(1).

¹⁸² Original Act § 31-1-62(b)(1).

¹⁸³ State Bar Proposal at 21.

¹⁸⁴ Original Act § 31-1-62(b).

¹⁸⁵ Act § 31-1-63(a).

¹⁸⁶ Original Act § 31-1-63(b).

¹⁸⁷ Original Act § 31-1-68(b).

When an order of revocation becomes effective, the Original Act contained no further provisions, except to state that the authority of the corporation to conduct affairs or to do or transact business in West Virginia shall cease.¹⁸⁸ This provision has been amended and now requires that regardless of whether the revocation is appealed, the order must be recorded in the office of the clerk of the county commission in the county where the corporation's original certificate of authority was recorded, noting in the margin of the record book that the certificate of authority has been revoked.¹⁸⁹

When a foreign corporation desires to cease transacting business in West Virginia, the Original Act required the corporation to procure a certificate of withdrawal. Several conditions were set forth, such as publication of withdrawal in the West Virginia county wherein the principal office was located, application to the Secretary of State on forms supplied by that official, satisfaction of the Secretary of State that all fees were paid, and the return of the certificate of withdrawal to the corporation to be recorded.¹⁹⁰ This section has been amended to allow the foreign corporation to include in its application of withdrawal any information that would enable the Tax Commissioner, as well as the Secretary of State, to decide whether all fees and the annual corporate license

¹⁸⁸ Original Act § 31-1-63.

¹⁸⁹ Act § 31-1-63(c). This section fails to state who has the duty of recording the order of revocation. The original act placed the responsibility on the corporation or its representative when recording the articles of incorporation (Original Act § 31-1-33), the articles of amendment (Original Act § 31-1-31), the certificate of incorporation (Original Act § 31-1-28), the articles of dissolution (Original Act § 31-1-40), and a certificate of authority issued to a foreign corporation (Original Act § 31-1-54). The amended Act requires, in the process of a foreign corporation's withdrawal from West Virginia, that the corporation or its representative must record the certificate of withdrawal (Act § 31-1-60). Yet in an involuntary dissolution, the Act as amended places the duty with the clerk of the court entering the dissolution order, to see that the order was recorded (Act § 31-1-46). Thus, the amended Act does not say to which party the duty of recording falls, the corporation or the clerk of the court. In summary, the wording of the section in question is similar to the wording of the section providing that the clerk of the court will oversee the recording of the involuntary dissolution order, and that an analogy may be drawn such that an order of revocation is also involuntary. However, it can be pointed out that the framers of the amendment drafted the amendment with the purpose of conforming the recording requirements of revocation with those of incorporation, amendments, dissolutions, and withdrawals, and therefore it would be the corporation's responsibility to record. State Bar Proposal at 8.

¹⁹⁰ Original Act § 31-1-60.

tax have been paid.¹⁹¹ The amendment deletes the requirement that the corporation's authority to conduct affairs, or to do or transact business in the state shall cease upon recording the certificate of withdrawal.¹⁹² The purpose of this change was to avoid making the termination of authority dependent upon the recording of the certificate of withdrawal.¹⁹³ Consequently, the exact time the corporation's authority ceases is questionable. However, this provision is similar to one provided in the Model Business Corporation Act which states that the authority of the corporation to transact business ceases upon the issuance of a certificate of withdrawal.¹⁹⁴

VI. CONCLUSION

The Original Act was the basis for an up-to-date corporation law for West Virginia equal to other states, and to that recommended in the Model Business Corporation Act. The full ramifications of the Act will not be known for some time, but it is reasonable to expect a reduction in litigation in such problem areas as stockholder suits, conflicts of personal and official duties of directors, and the construction and destruction of corporate entities.

It was with wise foresight that a committee was created to study the Act and amend those areas wherein potential problems remained. The purpose of the amendments were to: (1) clarify the phrasing, meaning and implications within the Original Act; (2) align more fully the West Virginia Corporation Act with the Model Business Corporation Act, and statutory language common in other states; (3) codify widespread practices within the state and recodify procedures familiar to pre-Act days; (4) standardize the recording procedure throughout the Act; and (5) condense many separate procedures that by the Original Act were required of the business and nonprofit corporation into single procedures to avoid expense, litigation and confusion. These purposes were fulfilled through the combination of the West Virginia pre-Act law, the Original Corporation Act, the Delaware law, and the American Bar Association Model Acts on Business Corporations and Nonprofit Corporations. The amended Act will be simpler to use because many of the amendments were adopted from the Model Act's

¹⁹¹ Act § 31-1-60.

¹⁹² Act § 31-1-60(f).

¹⁹³ State Bar Proposal at 21.

¹⁹⁴ 2 MODEL BUS. CORP. ACT ANN. § 133, ¶ 1 (1960).

many principles, noted for their appeal to states where small corporations are in the majority. Moreover, these states are developing a large body of judicial precedents which will prove helpful in interpreting those principles. Therefore, the Act, subsequent to amendment, is made more consistent, less ambiguous and more easily utilized.

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